No. 90-1752

Supreme Court, U.S.
FILED
JUN 14 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

ALBERT THOMAS,

Petitioner,

vs.

BLISS & LAUGHLIN STEEL CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM R. SULLIVAN, JR.
Counsel of Record
CAMILLE A. OLSON
TIMOTHY P. PAYNE
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
Attorneys for Respondent
Suite 4200
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

550
Lutz Appellate Printers, Inc. • NJ (201) 257-6850 • (800) 3 APPEAL • NY (212) 840-4640 • MA (617) 542-1114 DC (202) 783-7288 • PA (215) 925-6500 • USA (800) 5 APPEAL

QUESTION RESTATED

Whether this Court should review a factual determination made by the United States District Court for the Northern District of Illinois that was affirmed by the United States Court of Appeals for the Seventh Circuit?

STATEMENT REQUIRED BY RULE 29.1

Respondent Bliss & Laughlin Steel Company is a subsidiary of Bliss & Laughlin Industries Inc. More than 10 percent of Bliss & Laughlin Industries Inc.'s issued and outstanding stock is owned by Stelco, Inc., which is a publicly held corporation, and Mr. Gregory Parker, an individual.

TABLE OF CONTENTS

Page

Question Restated i

Statement Required by Rule 29.1 ii

Table of Contents iii

Table of Citations iii

Counterstatement of the Case 2

Reasons for Denying the Writ 4

Conclusion 8

TABLE OF CITATIONS

Cases Cited:

Berenyi v. Director of Immigration and Naturalization Service, 385 U.S. 630 (1987) 5

Blau v. Lehman, 368 U.S. 403 (1962) 5

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) 5

Rodgers v. Lodge, 458 U.S. 613 (1982) 5

Statutes Cited:

29 U.S.C. § 621 *et seq.* 2

Contents

Page

42 U.S.C. § 1981 2

42 U.S.C. § 2000e *et seq.* 2

Other Authorities Cited:

S. Ct. Rule 10.1 ..... 2, 4

Federal Rule of Appellate Procedure 28 3

No. 90-1752

In The

Supreme Court of the United States

October Term, 1990

ALBERT THOMAS,

Petitioner,

vs.

BLISS & LAUGHLIN STEEL CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The petition for writ of certiorari is meritless. The United States District Court for the Northern District of Illinois, after a full trial on the merits, held that respondent's stated reasons for terminating petitioner were not pretextual and that age was not a determining factor in respondent's decision to terminate petitioner's employment. After a careful review of the entire record on appeal, the United States Court of Appeals for the Seventh

Circuit affirmed that holding. Petitioner presents no issue appropriate for review by this Court. *See* Supreme Court Rule 10.1.

COUNTERSTATEMENT OF THE CASE

On December 12, 1986, petitioner filed a two-count complaint with the United States District Court for the Northern District of Illinois, Eastern Division (Docket No. 86 C 9949). Count I of petitioner's complaint alleged that Bliss & Laughlin Steel Company had discharged petitioner on the basis of his age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* Count II of petitioner's complaint alleged that petitioner was discharged on the basis of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* and 42 U.S.C. § 1981.

On August 18, 1989, in a lengthy opinion by Chief Judge James B. Moran, the District Court for the Northern District of Illinois granted respondent's motion for summary judgment with regard to Count II of petitioner's complaint and denied summary judgment with regard to Count I. The District Court found that there was no evidence to support a race discrimination claim other than petitioner's own perception, and thus dismissed Count II (Petitioner's Appendix, A24). With regard to Count I, petitioner alleged that at the time of his termination, respondent's manager stated, "the Company had decided to go with the youngest and best educated employees." (A23). The District Court determined that taking petitioner's testimony as true for the purposes of the motion, it was sufficient to defeat the motion for summary judgment (A24). The case thereafter proceeded to trial on the merits of Count I of petitioner's complaint.

After a full trial on petitioner's allegations of age discrimination, the jury did not reach a verdict. By agreement,

the parties allowed the court to render a decision. The court found in favor of respondent and issued a memorandum and order on September 11, 1990 (A47).

The District Court found that petitioner's strongest support for his claim of age discrimination was the statement allegedly made by respondent's manager at the time petitioner was informed of his termination. The court concluded that some statement was, in fact, made. However, the court made a specific factual determination that the statement was an expression of the company's desire for maximum flexibility and the manager's conclusion that the petitioner did not provide it, rather than an expression of age bias (A52). The court also stated that after observing petitioner at trial and hearing him testify, the court found petitioner to be a thoroughly honorable person who was somewhat rigid, set in his ways, and who had some difficulty in adapting and changing on the basis of new information if it did not conform to his then perceptions (A52). The court, therefore, concluded that the manager's statement did not support petitioner's allegations that age was a determining factor in his termination (A53).

On December 26, 1990, petitioner filed a brief and short appendix with the United States Court of Appeals for the Seventh Circuit requesting review of the District Court's order of August 18, 1990 granting respondent's summary judgment with regard to Count II of petitioner's complaint and the September 11, 1990 memorandum and order granting judgment to respondent on Count I. On January 11, 1991, respondent filed a motion to dismiss petitioner's appeal to the Seventh Circuit, on the bases that petitioner's appeal did not comply with Federal Rule of Appellate Procedure 28, and it did not specify any error in the District Court's decision. Petitioner filed a brief in opposition to respondent's motion to dismiss on January 17, 1991.

On February 4, 1991, the Seventh Circuit Court of Appeals issued an order stating that it construed the motion to dismiss as a motion for summary affirmance (A6). The order stated that the court had carefully reviewed the final order of the District Court, the record on appeal, the respondent's motion and the petitioner's opening brief (A7). The order also stated that based on its review of the entire record, no further briefing would be helpful to its consideration of the issues. Based on the entire record, the Seventh Circuit granted summary affirmance of the District Court's decision (A7).

On February 14, 1991, the Seventh Circuit denied petitioner's motion for reconsideration of the Seventh Circuit's February 4, 1991 order summarily affirming the District Court's decision (A1).

REASONS FOR DENYING THE WRIT

The petition does not set forth any issues which are appropriate for this Court's consideration. *See* Supreme Court Rule 10.1. Petitioner does not raise any issues about which there is a conflict among the federal courts of appeals, nor does he request this Court settle an important issue of federal law. Rather, petitioner merely requests that this Court review a factual determination of the District Court that was affirmed by the Seventh Circuit Court of Appeals.

1. In a well-reasoned opinion, the District Court made an evidentiary conclusion that the stated reasons for petitioner's layoff and termination were not pretextual and that age was not a determining factor in the company's decision (A47-A53). After a careful review of the record, the District Court's decision was summarily affirmed by the Seventh Ciruit (A6, A7).

Petitioner's principal contention is that the District Court erred in its evidentiary determinations. In particular, petitioner

asserts that the District Court erred by not finding that a statement allegedly made by respondent's manager established that age was a determining factor in respondent's decision (Petition, 4, 5). Thus, petitioner's dispute is purely an issue of factual determination.

This Court has long pronounced that it will not review findings of fact by courts below in the absence of a very obvious and exceptional showing of error. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *Rodgers v. Lodge*, 458 U.S. 613, 622-623 (1982); *Blau v. Lehman*, 368 U.S. 403, 408-09 (1962); *Berenyi v. Director of Immigration and Naturalization Service*, 385 U.S. 630, 635 (1967). In *Berenyi*, this Court explained why it is reluctant to disturb factual determinations:

> This court possesses no emperical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolutions of the disputed factual issues turns largely on an assessment of the relative credibility of the witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force.

Berenyi, 385 U.S. at 636.

In the instant case, after hearing the testimony of both petitioner and the manager, the District Court determined that the alleged statement, whatever was said, was an expression of the company's desire for maximum flexibility and the manager's conclusion that petitioner did not provide it, rather than an expression of age bias (A52). Specifically, the District Court concluded:

> By far, plaintiff's strongest support for his contention that age was a determining factor is

> a statement he attributes to Daugherty on September 27, 1985, when he told plaintiff of the decision. According to plaintiff, Daugherty said the company was going to keep the youngest and most educated people. Daugherty denies so stating, but we conclude that something very similar was said. We do not conclude, however, that the statement meant that age as such was a determining factor. The company needed flexible people. We observed plaintiff at trial; we heard him testify. He came through as a thoroughly honorable person who was somewhat rigid and somewhat set in his ways and who had some difficulty in adapting and changing on the basis of new information if it did not conform to his then perceptions. *Whatever Daugherty precisely said, we believe* that it was an expression, however inartfully phrased, of the company's desire for maximum flexibility and his conclusion that plaintiff did not provide it. Plaintiff has every reason to believe that he was far more loyal to the company than the company was to him, but we do not conclude that age was a determining factor in defendant's decision.
>
> Judgement is entered for the defendant.

(A52-53, emphasis in original.)

Such determinations were clearly within the District Court's discretion and were not in error. Petitioner does not set forth any reasons that the District Court's conclusions were very obviously in error. After careful review of the record and petitioner's brief, the Seventh Circuit Court of Appeals refused to disturb any of the District Court's factual determinations (A6, A7). Therefore, no exceptional error being present in this case,

additional review by this Court is inappropriate.[1]

2. Petitioner's second and third Questions Presented for Review are entirely based on petitioner's misunderstanding of the appellate court's ruling. Petitioner claims that the Seventh Circuit dismissed his appeal as frivolous based on form rather than substance, and in violation of the concept of simple appeal (Petition, 5). A review of the record, however, reveals that no such ruling was ever made by the Seventh Circuit.

Respondent filed a motion to dismiss petitioner's appeal, claiming that petitioner's appeal was meritless because it was lacking in both form and substance. Petitioner filed a brief in response to respondent's motion. After carefully reviewing the record below, respondent's motion, and petitioner's briefs, the Seventh Circuit determined that further briefing would not be helpful to its consideration of the issues (A6, A7). Instead, based on its *sua sponte* review of the entire record, the Seventh Circuit Court of Appeals affirmed the District Court's opinion (A6, A7). Thus, contrary to petitioner's belief, the Seventh Circuit affirmed the District Court's decision following a thorough review of the merits, not on a procedural basis.

Therefore, petitioner's claim that the Seventh Circuit improperly dismissed petitioner's appeal on a procedural ground is a misintepretation of the Seventh Circuit's decision in this case

---

1. It is unclear whether petitioner seeks review of the District Court's decision granting summary judgment in favor of respondent with regards to petitioner's allegation of race discrimination. Petitioner does not set forth this issue in the Questions Presented for Review, nor does petitioner explain any error committed by the courts below. Rather, petitioner merely asserts that the District Court erred in its decision (Petition, 6). Notwithstanding petitioner's failure to properly raise this issue, such an issue is improper for review by this Court for the same reasons set forth above with regards to petitioner's request for review of the decision on his age discrimination claim.

and petitioner's second and third Questions Presented for Review request this Court to review a decision which, in fact, was never rendered.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM R. SULLIVAN, JR.
Counsel of Record
CAMILLE A. OLSON
TIMOTHY P. PAYNE
SEYFARTH, SHAW,
FAIRWEATHER &
GERALDSON
Attorneys for Respondent
Suite 4200
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

Dated: June 14, 1991